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No. 23

# In the Supreme Court of the United States

OCTOBER TERM, 1960

THE UNITED STATES OF AMERICA, AS TRUSTEE FOR THE SOLE USE AND BENEFIT OF THE GENERAL POST FUND, PETITIONER

*v.*

STATE OF OREGON, ACTING BY AND THROUGH THE STATE LAND BOARD, AND PORTLAND TRUST & SAVINGS BANK, ACTING BY AND THROUGH THE STATE LAND BOARD

IN THE MATTER OF THE ESTATE OF ADAM B. WARPOUSKE

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

J. LEE RANKIN,
*Solicitor General,*
GEO. S. LEONARD,
*Acting Assistant Attorney General,*
ALAN S. ROSENTHAL,
DAVID L. ROSE,
*Attorneys,*
*Department of Justice, Washington 25, D.C.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon entered in this case on May 18, 1960.

### OPINIONS BELOW

The opinion of the Circuit Court of Multnomah County, Oregon (App., *infra*, pp. 41–42) is unreported. The opinion of the Supreme Court of Oregon (App. *infra*, pp. 22–40) is reported at 352 P. 2d 539.

### JURISDICTION

The judgment of the Supreme Court of Oregon was entered on May 18, 1960 (App., *infra*, pp. 40–41). The

jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

## QUESTIONS PRESENTED

1. Whether 38 U.S.C. (1952 ed.) 17–17j,[1] which vests in the United States (as trustee for the General Post Fund) the personal property of veterans who die intestate and without heirs while receiving care or treatment in the facilities of the Veterans Administration, requires the existence of a common law contract between the veteran and the United States, and thus does not apply to the property of veterans who were incompetent at the time of their admission to the Veterans Administration facility.

2. Whether Congress can constitutionally provide, as a condition to the furnishing of care or treatment by the Veterans Administration to an incompetent veteran, that if he dies intestate and without heirs his personal property shall vest in and become the property of the United States for the benefit of other veterans.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution provides in relevant part as follows:

> Fifth Amendment:
>
> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.
>
> Tenth Amendment:
>
> The powers not delegated to the United States by the Constitution, nor prohibited by

[1] 38 U.S.C. (1952 ed.) 17–17j is now codified as 38 U.S.C. 5220–5228. See fn. 2, *infra*, p. 3.

it to the States, are reserved to the States respectively, or to the people.

2. 38 U.S.C. 17–17j (1952 ed.),[2] the Act of June 25, 1910, 36 Stat. 736, as amended by the Act of December 26, 1941, 55 Stat. 868, provides in pertinent part:

> § 17. *Vesting of undisposed personalty in United States as trustee for General Post Fund.*
>
> Effective ninety days after December 26, 1941, whenever any veteran (admitted as a veteran) shall die while a member or patient in any facility, or any hospital while being furnished care or treatment therein by the Veterans' Administration, and shall not leave surviving him any spouse, next or kin, or heirs entitled, under the laws of his domicile, to his personal property as to which he dies intestate, all such property, including money and choses in action, owned by said decedent at the time of death and not disposed of by will or otherwise, shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund, a trust fund prescribed by section 725s (b)(45) of Title 31.
>
> The foregoing provisions are conditions precedent to the initial, and also to the further furnishing of care or treatment by the Veterans' Administration in a facility or hospital.

[2] The provisions of this statute were reenacted without significant change by the Act of June 17, 1957 (Title XIX), 71 Stat. 149. The statute was codified by the Act of Sept. 2, 1958, 72 Stat. 1256, as 38 U.S.C. 5220–5228. Since the veteran here died in 1956, we refer throughout this petition to the statute in force at the time, and to the 1952 Code.

The acceptance of care or treatment by any veteran admitted as such to any Veterans' Administration facility or hospital after ninety days from December 26, 1941, and as well the continued acceptance of care or treatment furnished by the Veterans' Administration after said ninety days by any veteran who is then receiving the same shall constitute an acceptance of the provisions and conditions of this subchapter and have the effect of an assignment, effective at his death, of such assets in accordance with and subject to the terms and provisions of this subchapter and the regulations issued in accordance with and pursuant thereto.

§ 17a. *Presumption from death in facility of contract for disposition of property.*

The fact of death of the veteran (admitted as such) in a facility or hospital, while being furnished care or treatment therein by the Veterans' Administration, leaving no spouse, next of kin, or heirs, shall give rise to a conclusive presumption of a valid contract for the disposition in accordance with this subchapter, but subject to its conditions, of all property described in section 17 of this title owned by said decedent at death and as to which he dies intestate.

* * * * *

§ 17c. *Disbursements from Fund; payment of creditors.*

Disbursements from the General Post Fund shall be made by the Division of Disbursements, Treasury Department, upon the order and within the discretion of the Administrator of Veterans' Affairs for the benefit of members

and patients while being supplied care or treatment by the Veterans' Administration in any facility or hospital, and this authority is not limited to facilities or hospitals under direct administrative control of the Veterans' Administration: *Provided, however,* That there shall be paid out of the assets of the decedent so far as may be the valid claims of creditors against his estate that would be legally payable therefrom in the absence of this subchapter and without the benefit of any exemption statute, and which may be presented to the Veterans' Administration within one year from the date of death, or within the time, to the person, and in the manner required or permitted by the law of the State wherein administration, if any, is had upon the estate of the deceased veteran; and also the proper expenses and costs of administration, if any: *And provided further,* That if the decedent's estate be insolvent the distribution to creditors shall be in accordance with the laws of his domicile, and the preferences and priorities prescribed thereby shall govern, subject to any applicable law of the United States.

§17d. *Disposition of remainder of assets; acquisition of assets by the Administrator of Veterans' Affairs.*

The remainder of such assets or their proceeds shall become assets of the United States as trustee for said Post Fund and disposed of in accordance with this subchapter: If there be administration upon the decedent's estate such assets, other than money, upon claim thereof within the time required by law, shall be by the administrator of the estate delivered

to the Administrator of Veterans' Affairs or his authorized representative, as upon final distribution; and upon the same claim there shall be paid to the Treasurer of the United States for credit to said Post Fund any such money available for final distribution. In the absence of administration, any money, chose in action, or other property of the deceased veteran held by any person shall be paid or transferred to the Administrator of Veterans' Affairs upon demand by him or his duly authorized representative, who shall deliver itemized receipt therefor. Such payment or transfer shall constitute a complete acquittance of the transferor with respect to any claims by any administrator, creditor, or next of kin of such decedent.

* * * * *

§ 17g. *Notice to veterans of law.*

The Administrator of Veterans' Affairs shall prescribe a form of application for hospital treatment and domiciliary care which shall include notice of the provisions of this subchapter. Within ninety days after approval hereof similar notice shall be given to each veteran then receiving care in any facility or hospital as described in this subchapter: *Provided, however,* That this requirement shall be met by posting of said notice with a copy of the prescribed form in a prominent place in each building wherein patients or members are housed.

* * * * *

**STATEMENT**

This case involves the competing claims of the United States (as trustee of the General Post Fund) and the State of Oregon to the net estate from the personal property of a deceased veteran of the armed

services who died intestate and without heirs after being admitted to a Veterans Administration hospital for care and treatment. The claim of the United States, as trustee of the General Post Fund, is founded upon the provisions of 38 U.S.C. 17–17j, *supra*, pp. 3–6. The General Post Fund is used exclusively to provide veterans in facilities of the Veterans Administration with recreational and religious programs and equipment. The State of Oregon's claim is based upon its escheat statute.

The pertinent facts are not in dispute. Adam B. Warpouske served in the Army during World War I. In 1924 he obtained a pension from the Veterans Administration for a non-service-connected mental disability (Ex. 3, p. 3). He was mentally ill for the remainder of his life (App., *infra*, p. 42). Between 1930 and 1945 he was admitted to hospital facilities of the Veterans Administration on fourteen occasions, and spent a total of approximately 10 years in such facilities (Ex. 6d, pp. 2–3, Ex. 6(f)).

In connection with these admissions, the veteran signed a number of application forms in which he agreed that, if he should die intestate and without heirs "while receiving care", his property would vest in the Veterans Administration for use of the Post Fund.[3] Although some psychiatric examinations dur-

[3] The form of the agreement was not identical in each application, but a typical agreement contained the following language: "I agree that, in the event of my death while under care, leaving no heirs at law nor next of kin, all personal property owned by me at the time of my death, including money or choses in action held by me and not disposed of by will,

ing this period indicated that he was incompetent, others indicated that he was competent even though suffering from mental illness.* In 1945 he was discharged from a Veterans Administration hospital in Wood, Wisconsin, as "improved and competent", although still "unemployable" (Exh. 6(f) & (g)). He was awarded a total and permanent disability pension which continued until his death (Ex. 6(h) and Ex. 1, p. 27).

On December 31, 1955, while a resident of Multnomah County, Oregon, the veteran was admitted to the Good Samaritan Hospital in Portland for treatment of a hip fracture and a cerebral hemorrhage (R. 49, p. 18). Because it appeared that he was without funds, on January 5, 1956, he was transferred to the Multnomah County Hospital* for treatment at the expense of the county (R. 49, p. 18). He remained there until March 1, 1956, when he was moved to the Veterans Hospital in Portland (R. 49, p. 18). At the time of his admission to this facility he was incompetent (App., *infra*, p. 42). On March 9, 1956, the Portland Trust Bank was appointed as his guardian (R. 13, 16). There was no evidence that the guardian protested or objected to his remaining in the Veterans Hospital or as to his receiving care and treatment there.

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whether such property be the proceeds of pension, compensation, retirement pay, or life insurance, or otherwise derived, shall vest in and become the property of the Veterans Administration for the sole use and benefit of the post fund, and that all my personal property shall upon my death, while under care, at once pass to and vest in the Veterans Administration subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within 5 years after my death." (Sec. 12, Ex. 4.)

* See *e.g.* Ex. 5.

Warpouske died on March 19, 1956. A few days before, it had been discovered that he was the sole heir to the estate of his brother, who had died intestate the previous fall while receiving care in a Veterans Administration hospital in Wisconsin (R. 4). By reason of this inheritance, the veteran left a net estate of $13,727.14, of which $971.47 was attributable to unused federal pension funds (R. 34).

Under the provisions of 38 U.S.C. 17–17j, *supra*, the Administrator of Veterans Affairs filed in the Oregon probate court a "Claim for personal Property in Estate" on behalf of the United States, as trustee of the General Post Fund, and the Oregon State Land Board filed a petition for escheat (R. 12, 22). After trial, the Oregon probate court (the Circuit Court for Multnomah County, Department of Probate) found that the deceased was not mentally competent to understand the consequences of his acceptance of hospitalization in the Veterans Administration hospital or to enter into any contract respecting his hospitalization. For that reason it held (App., *infra*, p. 42):

> "* * * the provisions of Section 17, Title 38, United States Code, cannot and do not control the disposition or vesting of his personality at the time of his death."

Consequently, except for that portion of the estate attributable to federal pensions,[5] the court ordered the escheat of the estate to Oregon.

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[5] The State conceded that the United States was entitled to the remainder of such funds by reason of 38 U.S.C. (1952 ed.) 450(3).

On appeal by the United States,* the Supreme Court of Oregon affirmed. The court expressed the view that 38 U.S.C. 17–17j would be in violation of both the Fifth and Tenth Amendments to the United States Constitution if applied to the estate of a veteran who had no capacity to contract when he entered the hospital (App., *infra*, pp. 29–35). Because of this consideration, the court concluded that the statute should be construed as "sound[ing] in contract" and therefore inapplicable to a veteran who was incompetent at the time he entered the hospital (App., *infra*, pp. 26, 29).

## REASONS FOR GRANTING THE WRIT

The Oregon Supreme Court has construed 38 U.S.C. 17–17j, *supra*, pp. 3–6, in a manner which cannot be reconciled with the clear and explicit terms of the statute. Its reading also conflicts with the long-standing administrative interpretation and with the uniform decisions of other state courts applying the statute to the estates of incompetent veterans. Further, the court below has cast doubt upon the constitutionality of the statute as heretofore interpreted. For these reasons, as well as because the question is of recurring importance, review by this Court is warranted.

1. 38 U.S.C. 17, *supra*, pp. 3–4, states without qualification that "whenever *any* veteran shall die at a facility of the Veterans Administration intestate and without heirs, his "personal property * * * *shall immediately vest* in and become the property of the United

*On appeal, the United States contended that 38 U.S.C. 17–17j applied to the instant case, and that as so-applied it was constitutional.

States as trustee for the sole use and benefit of the General Post Fund * * *" (emphasis added). The section goes on to stipulate that "The foregoing provisions are conditions precedent to the initial, and also to the further furnishing of care or treatment by the Veterans Administration in a facility or hospital" and that "The acceptance of care or treatment by any veteran admitted as such * * * *shall constitute* an acceptance of the provisions and conditions of this subchapter and *have the effect* of an assignment, effective at his death, of such assets * * *" (emphasis added). Finally, in Section 17a, *supra*, p. 4, Congress provided that the death of a veteran, while being furnished care or treatment in a Veterans Administration facility, gives rise to a *"conclusive presumption* of a valid contract" for the disposition of his property in accordance with the statute (emphasis added).

We submit that, whether taken separately or together, these provisions require the conclusion that the statute applies to *all* veterans and that the only relevant inquiry is into whether the veteran died intestate and without heirs while admitted as a patient in a V.A. facility. If so, by express Congressional direction his property "shall immediately vest" in the United States.

In arriving at its conclusion that the statute requires that the veteran have possessed contractual capacity at the time of admission, the Oregon Supreme Court did not discuss Section 17. And, insofar as the conclusive presumption provision (Section 17a) is concerned, the court held, in effect, that Congress

could not have meant what it said because, as applied to an incompetent veteran, the presumption would violate the Fifth Amendment (App., *infra*, pp. 28–34).

The Oregon court also suggested that the application of the statute to incompetent veterans would be "basically contrary to the traditional solicitude of the government for the veteran" (App., *infra*, p. 34). Apart from its doubtful relevance, this observation ignores the fact (1) that the statute takes nothing from the veteran, his heirs or the beneficiaries of his testamentary bounty and (2) if it vests in the United States, the veteran's property can be used only for the benefit of other veterans.

2. The decision of the Oregon court holding the statute inapplicable to incompetent veterans is in conflict with the holdings of the courts of last resort of two states. *In re Estate of Skriziszouski*, 382 Pa. 634, 116 A. 2d 841; *In re Gonsky's Estate*, 79 N.D. 123, 55 N.W. 2d 60. The decision is also in conflict with a lower court decision in New York. *In re Bonner's Estate*, 192 Misc. 753, 80 N.Y.S. 2d 122 (Sur. Ct., Queens Co.). We are not aware of any decisions, either in state or federal courts, which agree with the decision below.[7]

In *Skriziszouski*, the Supreme Court of Pennsylvania applied 38 U.S.C. 17–17j to the entire estate of a veteran who was incompetent when he entered a V.A. institution. While the Oregon court endeavored to distinguish the case on the ground that most of the estate was derived from federal pension

[7] None of the cases cited for support by the court below concerned incompetent veterans.

benefits, the opinion of the Pennsylvania court does not make or justify this distinction. Moreover, a lower Pennsylvania court has expressly held that *Skriziszouski* controls regardless of the proportion of the incompetent veteran's estate which can be traced to federal pension moneys. *Estate of Maguire,* 13 D. and C. 2d 247, 7 Fiduc. Rep. 701, (Orphans Ct., Philadelphia). And in *Bonner's, supra,* the New York court applied Sections 17–17j to all the property of an incompetent veteran, including substantial amounts not shown to have been derived from pension benefits.

The Supreme Court of North Dakota has also applied the statute to the estate of an incompetent veteran. *In re Gonsky's Estate, supra.* The Oregon court distinguished *Gonsky* on the ground that the estate in that case was derived from federal pensions and therefore became the property of the United States under another statute, 38 U.S.C. (1952 ed.) 450 (3) (App., *infra,* pp. 37–38). The attempted distinction, however, cannot be squared with the express language of the *Gonsky* opinion that "the facts in this case clearly bring it within the provisions of Sections 17, 17a, 17f, Title 38 USCA", or with the North Dakota court's holding that the property passed to the United States under 38 U.S.C. 17–17j "for the sole use and benefit of the General Post Fund."* 79 N. Dak. at 130 and 136.

* Property passing to the United States by virtue of 38 U.S.C. (1952 ed.) 450 (3) is not used for the General Post Fund but is credited to current appropriations for payment of compensation, insurance, or pensions.

3. Nothing in *United States* v. *Stevens*, 302 U.S. 623, calls for the result reached below. In that case, a competent veteran entered into an express contract for the disposition of his property, pursuant to the Sundry Appropriations Act of June 25, 1910 (36 Stat. 703, 736), the predecessor of 38 U.S.C. 17–17j. This Court found all the requirements of a common law contract, valid under the laws of the appropriate state, and thus did not reach any questions concerning the effect of the federal statute in the circumstances here presented. The Court characterized the statute as one which "directed the terms and conditions" under which veterans can gain admittance to institutions owned and operated by the Federal Government for them. 302 U.S. at 627.

The 1910 Act provided that the "application of any person for membership" in the National Home for Disabled Volunteer Soldiers and the "admission of the applicant thereunder shall be and constitute a valid and binding contract". The managers of the Home were directed to change the form of application to give reasonable notice and "to contain the consent of the applicant" of the conditions imposed by the statute. 36 Stat. 736. This provision was merely a directive, and not a prerequisite to the validity of the contract. The only requirements for a valid contract were "the application" and "the admission of the applicant thereunder." Therefore, even under the 1910 Act the competence of the veteran at the time he made his application was probably irrelevant and the Act applied alike to competent and incompetent veterans.

The 1910 Act was amended by the Act of Dec. 26, 1941, 55 Stat. 868, and became 38 U.S.C. 17–17j. The primary objective of the amendment was to enlarge the coverage of the 1910 Act to include veterans who died while receiving hospital treatment, as well as those who were receiving domiciliary care. H. Rept. No. 609, 77th Cong., 1st Sess.; Sen. Rept. No. 900, 77th Cong., 1st Sess. The earlier Act was, however, completely recast, enlarged, and made more detailed. Of particular significance is the fact that Congress dispensed with the prior requirements of an application and admission thereunder, and omitted any attempt to obtain the consent of the individual veteran. Thus, while the original statute required some formalities, the statute as modified was self-executing and required no agreement and none of the other usual incidents of a contract. This history confirms the clear intent of Congress, as expressed in its language, that the statute should apply to both competent and incompetent veterans who die while receiving care or treatment at a V.A. installation.*

* The legislative history of the Act of Dec. 26, 1941, is meagre. Neither of the Committee reports casts any light upon the problem involved here. H. Rept. No. 609 and Sen. Rept. No. 900, 77th Cong., 1st Sess. No record of a hearing in either House has been found. The bill was drafted by the Veterans Administration and was approved and passed without modification. 87 Cong. Rec. 5850–5851, 9771. In a brief colloquy on the floor of the House, however, Congressman Rankin, the Chairman of the Committee on World War Veterans' Legislation, expressed an opinion that the proposed legislation required the agreement of the veteran to its terms and therefore did not apply to veterans who were insane or physically unable to agree. 87 Cong. Rec. 5203. No action was taken

While we have not been able to ascertain the administrative practice under the 1910 Act prior to its amendment in 1941, we have been advised by the Veterans Administration that since 1941 the statute has been administratively interpreted as applying to competent and incompetent veterans alike. See Appendix, *infra*, p. 44. This interpretation is, of course, entitled to great weight.

4. The Oregon Supreme Court's construction of 38 U.S.C. 17–17j was influenced by the court's belief (App., *infra*, pp. 29–35) that the application of the statute to an incompetent veteran would violate the Fifth and Tenth Amendments. We submit that this belief is without foundation and that no constitutional problem arises from the enforcement of the statute in accordance with its plain terms.

a. 38 U.S.C. 17–17j does not interfere with the veteran's rights under the Fifth Amendment. The operative provisions of the statute do not come into play unless and until the veteran dies without having made a testamentary disposition of his property and without leaving relatives entitled to inherit under the state law of intestate succession. If that situation occurs, the veteran's property rights have expired and the sole alternative to the vesting of his personalty in the United States is an escheat to the state.

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by the House following this discussion (87 Cong. Rec. 5203–5204), and there is no indication anywhere in the legislative history that any other Member of Congress subscribed to this view. In light of the fact that the bill was drafted in the Veterans Administration, and of the terms of Sections 17–17j, we do not think that this isolated opinion of Congressman Rankin can be regarded as reflecting the intention of Congress.

We do not understand the Oregon court to suggest that a state's right of escheat is within the ambit of the Fifth Amendment, and we submit that it is not. At best, it is doubtful that a state can be regarded as a "person" within the meaning of the Fifth Amendment. Cf. *United States* v. *Burnison*, 339 U.S. 87, 95. In any event, since an individual's right of succession to property is not protected by any provision in the Constitution (*Irving Trust Co.* v. *Day*, 314 U.S. 556, 562), it would seem to follow perforce that a state's right of escheat is not guaranteed by the Fifth Amendment.

b. Nor would the application of the statute in this case effect an escheat to the United States and thus invade "matters concerning the devolution of property [which] are reserved by the Tenth Amendment to the several states" (App., *infra*, p. 35). As expressly held by the Supreme Court of North Dakota, in a case involving an incompetent veteran, the vesting provisions of 38 U.S.C. 17 do not present a question of escheat. Rather, the rights of the United States arise "by virtue of the relations created under the terms of the statute." *In re Gonsky's Estate, supra*, 79 N.D. at 131.

Since its inception, the Tenth Amendment has been uniformly construed as not limiting the powers, express or implied, which have been delegated to the national government. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 324–325; *McCullough* v. *Maryland*, 4 Wheat. 316, 405–406; *United States* v. *Darby*, 312 U.S. 100, 124, and cases cited; *Fernandez* v. *Wiener*, 326 U.S. 340, 362; *Case* v. *Bowles*, 327 U.S. 92, 101–102;

*Oklahoma* v. *Civil Service Comm.*, 330 U.S. 127, 142–144. And the Federal Government may resort to "all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end" without violation of the Tenth Amendment. *United States* v. *Darby, supra.*

The delegated power to provide for the common defense and to raise and maintain an army and navy (Art. I, Section 8) confers authority upon Congress to provide pensions and other benefits, as a reward to those who have rendered faithful service in the armed forces of the United States and as an inducement for future service by others. See *Abbott* v. *Morgenthau,* 93 F. 2d 242 (C.A.D.C.), certiorari denied, 303 U.S. 638. In granting pensions and gratuities Congress may, of course, impose such terms and conditions as it sees fit so long as they are reasonably related to these overall objectives. See *Abbott* v. *Morgenthau, supra; Coakley* v. *Attorney General,* 318 Mass. 508, 62 N.E. 2d 659. Indeed, insofar as pensions are concerned, this was conceded by the court below (App., *infra,* pp. 35–37).

38 U.S.C. 17–17j does no more than attach a condition to the gratuitous treatment and care of veterans in V.A. facilities. And since the property vested under the statute is used solely for the benefit of other patients in such facilities, the condition is "plainly adapted" to the legitimate objective of Congress to care for the nation's veterans.

This case well illustrates the existence of a relationship between the hospitalized veteran and the United States which goes beyond that between the ordinary

citizen and his state of domicile (upon which escheat is predicated). The veteran here was provided with, in addition to a pension, gratuitous care for a non-service-connected disability for a total of more than ten years.

In this regard, it cannot be disputed that Congress could constitutionally provide, with respect to competent and incompetent veterans, that the value of care and treatment by the Veterans Administration should be chargeable against the veterans' estate in all circumstances. In the case of many veterans (including the veteran in this case), such a provision would reduce or eliminate the possibility of inheritance by surviving relatives or of an escheat. 38 U.S.C. 17–17j manifests a Congressional intent that the veteran's survivors not be taxed with the cost of his hospitalization and that, where there are neither heirs nor a testamentary disposition, other hospitalized veterans (rather than the public treasury) obtain the benefit of the veteran's estate. Surely, Congress' authority is not lessened because it chose to be more generous to veterans and their families than it might have been. Cf. *Ferry* v. *Ramsey*, 277 U.S. 88.

5. The questions involved here are of recurring importance. We have been advised by the Veterans Administration that, as of April 30, 1960, it had a total of 105,404 incompetent veterans on its rolls. Approximately 52,300 of these veterans were under treatment in V.A. neurological-psychiatric hospitals, and several thousands were under treatment in other types of V.A. hospitals and institutions. Although

there are no available statistics, it is believed that a very high percentage of the mentally ill patients were incompetent at the time of their admission to the V.A. facility. Thousands of incompetent veterans die every year at V.A. installations and hospitals,[10] many of them intestate and without heirs.[11]

If the decision below is permitted to stand, it can be anticipated that there will be a substantial increase in litigation with respect to the estates of incompetent veterans who die intestate and without heirs in V.A. institutions. While, up to this time, most states appear to have accepted the uniform judicial and administrative construction of 38 U.S.C. 17–17j, it is likely that they will now endeavor to obtain an interpretation from their state courts in accord with the contrary view of the Oregon court below.

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[10] The Annual Report of the Administrator of Veterans Affairs to Congress shows that in 1959 there were 2,818 deaths in neuropsychiatric hospitals alone (Table 7, p. 161). In 1958, the figure was 2,750 (Table 3, p. 150) and in 1957, 2,520 (Table 3, p. 154).

[11] The Veterans Administration's estimate is that the General Post Fund receives approximately $200,000 annually from the estates of deceased veterans. No reliable estimate can now be made as to the amount received from the estates of incompetent veterans.

## CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
*Solicitor General.*
GEO. S. LEONARD,
*Acting Assistant Attorney General.*
ALAN S. ROSENTHAL,
DAVID L. ROSE,
*Attorneys.*

AUGUST 1960.

# APPENDIX

## 1. Opinion of the Supreme Court of Oregon

Warner, J.

This is an appeal by the United States from a decree of the circuit court for Multnomah county, department of probate, escheating to the state of Oregon for the benefit of the common school fund that portion of the estate of Adam B. Warpouske received by him from the estate of his deceased brother. The United States claims said fund pursuant to a federal act hereinafter referred to, in its capacity as trustee, for the sole use and benefit of the General Post Fund, a trust created by that act.

The federal government's position here is predicated solely upon the provisions of 38 USCA §§ 17–17j, hereinafter referred to as the "Act of 1941." The pertinent sections read:

> "§ 17. Vesting of undisposed personalty in United States as trustee for General Post Fund
>
> "Effective ninety days after December 26, 1941, whenever any veteran (admitted as a veteran) shall die while a member or patient in any facility, or any hospital while being furnished care or treatment therein by the Veterans' Administration, and shall not leave surviving him any spouse, next of kin, or heirs entitled, under the laws of his domicile, to his personal property as to which he dies intestate, all such property, including money and choses in action, owned by said decedent at the time of death and not disposed of by will or other-

wise, shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund, a trust fund prescribed by section 725s (b)(45) of Title 31.

"The foregoing provisions are conditions precedent to the initial, and also to the further furnishing of care or treatment by the Veterans' Administration in a facility or hospital. The acceptance of care or treatment by any veteran admitted as such to any Veterans' Administration facility or hospital after ninety days from December 26, 1941, and as well the continued acceptance of care or treatment furnished by the Veterans' Administration after said ninety days by any veteran who is then receiving the same shall constitute an acceptance of the provisions and conditions of this subchapter and have the effect of an assignment, effective at his death, of such assets in accordance with and subject to the terms and provisions of this subchapter and the regulations issued in accordance with and pursuant thereto. * * *

"§ 17a. Presumption from death in facility of contract for disposition of property

"The fact of death of the veteran (admitted as such) in a facility or hospital, while being furnished care or treatment therein by the Veterans' Administration, leaving no spouse, next of kin, or heirs, shall give rise to a conclusive presumption of a valid contract for the disposition in accordance with this subchapter, but subject to its conditions, of all property described in section 17 of this title owned by said decedent at death and as to which he dies intestate. * * *

* * * * *

"§ 17g. Notice to veterans of law

"The Administrator of Veterans' Affairs shall prescribe a form of application for hos-

pital treatment and domiciliary care which shall include notice of the provisions of this subchapter. Within ninety days after approval hereof similar notice shall be given to each veteran then receiving care in any facility or hospital as described in this subchapter: *Provided, however*, That this requirement shall be met by posting of said notice with a copy of the prescribed form in a prominent place in each building wherein patients or members are housed. * * *"

The foregoing act was preceded by the Act of June 25, 1910, c. 384, which was amended by Act of December 26, 1941, c. 634, thus giving it its present form. In discussing certain decisions which follow, we will refer to the earlier version as the Act of 1910.

The facts are not in dispute. On December 31, 1955, Warpouske, a veteran of World War I, was admitted to Good Samaritan Hospital, in Portland, Oregon, for treatment of a hip fracture and cerebral hemorrhage. Five days later, he was moved to the Multnomah County Hospital for treatment at the expense of the county. There he remained until March 1, 1956, when he was transferred to the U.S. Veterans Hospital, Marquam Hill, Portland, Oregon.

While in the county hospital, his mental condition varied from comatose to semi-comatose and he was at all times lethargic and mentally confused. The testimony of one of the doctors of the county hospital was to the effect that Warpouske probably did not know where he was and in all probability did not even know he had been transferred. Indeed, the United States concedes that on March 1, 1956, by reason of his serious mental condition, he could not handle his own affairs. It also produced records of the Veterans' Administration showing, as early as 1924, a long history of mental deficiency predating his

last illness beginning in December, 1955. A diagnosis made by that facility in 1933 revealed a condition of dementia praecox as early as 1924, and concluded he was insane as of that date and probably before.

His treatment at the Veterans Hospital from the date of his entry, March 1, 1956, to the date of his death, March 19, 1956, reflects no change in his physical or mental condition. There is no evidence of or suggestion by the United States that the decedant during that period was even momentarily mentally competent to negotiate a contract or make a testamentary disposition of his property.

Dying as he did intestate and without known heirs, his estate will escheat to the state of Oregon unless it appears that the federal government has a superior right thereto under the sections of the Congressional Act of 1941, supra.

There is no record indicating who made the decision for the transfer. Certainly, the veteran had no capacity to do so nor did he then have a guardian or relative to act in his behalf. His presence in the Veterans Hospital can only be said to have been an involuntary admission, even though there was no question as to his right to be there by reason of his disabilities and war service status.

On March 9, 1956, the Portland Trust Bank was appointed guardian of Warpouske's estate for the purpose of receiving an inheritance from the estate of a brother who predeceased him in Wisconsin. This was in the net amount of $12,727.67. In addition thereto, he had when he died an item of personal property of the value of $28 and unexpended veterans pension benefits in the amount of $1,134.25. No contest exists between the parties as to the government's right to receive the last amount as rightly accruing to it under 38 USCA § 450(3) of the Act of 1930.

Out of the foregoing statement we cull these significant admitted facts which bear heavily in the formulation of our final judgment: Warpouske, long before determined insane, was totally mentally incompetent when he was involuntarily delivered to the Veterans Hospital on March 1, 1956; and that then and thereafter until the date of his death he was incompetent to contract or to make a will, and neither knew where he was or that he had been the recipient of a substantial inheritance.

Contrary to the argument advanced by the government, we are of the opinion that when we take the Act of 1941 by its four corners it sounds in contract. It is designed to effect a contractual relationship between the veteran patient and the United States. This is emphasized by words and phrases appearing in its several sections. Thus, we find "The *acceptance* of care or treatment * * * shall constitute an *acceptance* of the provisions and conditions of this subchapter and have the effect of an *assignment*" (Sec. 17 of Act); "The fact of death * * * shall give rise to a conclusive presumption of a valid *contract.*" (Sec. 17a of Act) We note, too, that Sec. 17g directs "a form of application for hospital treatment and domiciliary care which shall include a *notice* of the provisions of this subchapter." (Emphasis supplied.)

Appellant's principal assertion of error is: that the court erred "because [it held that] he [the decedent] had not entered into *a valid contract* with the United States providing for such disposition [of his estate] upon his death." (Emphasis supplied.)

The contractual character of the Act of 1941 has been consistently recognized and applied by the federal courts, as demonstrated by the following cases: *U.S.* v. *Gallagher,* 97 F Sup 1014, 1015 (SD Cal

1951); *U.S.* v. *Brown,* 110 F Sup 370, 372 (SD Cal 1952); *U.S.* v. *Peoples Nat. Bank of Chicago,* 121 F Sup 331, 332 (ND Ill 1953); *U.S.* v. *The Mid City Nat. Bank of Chicago,* 121 F Sup 402, 403 (ND Ill 1953); *U.S.* v. *Security-First Nat. Bank of Los Angeles,* 130 F Sup 521, 522 (SD Cal 1955); *U.S.* v. *Stevens,* 302 US 623, 82 L ed 484, 58 S Ct 388 (1938). It was also so construed in the following state cases: *In re Witte's Estate,* 174 Kan 360, 255 P2d 1039, 1042 (1953); *In re Turner's Estate,* 171 Cal Ap2d 682, 341 P2d 376, 379 (1959). All of the cases cited in this paragraph, except *U.S.* v. *Stevens,* construed the Act of 1941 as it is presently relied upon by the government.

It would appear from the Act of 1941, as well as by judicial declarations made in construing it, that the Congress acted with its usual respect for the Constitution and deliberately adopted the contractual concept in order to avoid trespassing upon an area reserved to the states by the Tenth Amendment; that is, the right to legislate concerning the devolution of property of intestates, including the right to declare escheats.

This conclusion is given recognition in *U.S.* v. *Stevens, supra* (82 L ed at 488), and in *U.S.* v. *Security-First Nat. Bank of Los Angeles, supra* (130 F Sup at 523).

The Act of 1941, being, as it is, a species of statutory contract, is governed by the ordinary rules relating to actions on contract. *Foley* v. *Leisy Brewing Co.,* 116 Iowa 176, 89 NW 230, 231.

It is a principle universally recognized that only the mentally competent can enter into a binding contractual engagement and so, too, the further rule that silence and inaction do not amount to an acceptance of an offer. *Dexter* v. *Hall,* 82 US 20, 21 L ed 73,

77; *Beach* v. *U.S.*, 226 US 243, 57 L ed 205, 33 S Ct 20. These declarations of the law form a part of our own jurisprudence. See *Farley* v. *Parker* (1876), 6 Or 105, 111; *Bowman* v. *Wade* (1909), 54 Or 347, 357, 103 P 72; and *Graham* v. *Allen* (1925), 116 Or 501, 505, 241 P 1007, wherein it was held that an instrument signed by one non compos mentis at the time of its execution is *void*. See, also, *German Savings & Loan Soc.* v. *DeLashmutt*, 67 F 399 (CC D Or 1895), following *Dexter* v. *Hall, supra; Edwards* v. *Davenport*, 20 F 756 (CC SD Iowa 1883), and *Farley* v. *Parker, supra*. Infants and the mentally incompetent both command the protection of courts of law, as well as courts of equity. *Dexter* v. *Hall, supra* (21 L ed at 77).

In coming to his conclusion in *U.S.* v. *Stevens, supra*, that a valid contractual relationship subsisted between the veteran and the government, we find what we deem a significant statement in the light of the facts prevailing in this matter. There, Mr. Justice Black observed: "Nothing in the record indicates that the agreement was not fairly and voluntarily entered into between the parties, or that it was inequitable, unjust or not upon valuable consideration. *Both parties were competent to make the contract.*" (302 US at 628; 82 L ed at 488.) (Emphasis supplied.)

Crowded to avoid the law's solicitude for the incompetent in the area of contract, appellant attempts to sidestep it by recourse to that part of Sec 17a of the Act of 1941, reading: "The fact of death of the veteran (admitted as such) in a facility or hospital, * * * leaving no spouse, next of kin, or heirs, shall give rise to *a conclusive presumption of a valid contract.*" (Emphasis supplied.) In support of this position, appellant advances the argument: "This provision is wholly inconsistent with the view of the

court below that Congress intended to require an actual contract between the veteran and the federal government." If by "actual" appellant means only express contracts and not contracts so forcibly implied by the statutory conclusion, then it flies in the face of the consistent line of federal holdings, as pointed out above, that both the Act of 1910 and its successor, the Act of 1941, are premised upon a theory of contractual relationship.

Assuming without deciding that between the government and veterans who are sui juris the Congress can create a valid contractual relationship by the employment of the conclusive presumption, we are still confronted with the question as to whether such a presumption can be effectively and constitutionally applied against a concededly incompetent veteran. In short, can a legislative body defy common experience and by resort to fiat convert the irrational into the rational, transform the unnatural into the natural? Has Congress the power by the adoption of the device of an absolute presumption to create a "valid" engagement out of one made by an incompetent person, which without doubt would otherwise be declared to be a nullity by the courts?

Presumptions, whether conclusive or disputable, are generally defined as inferences *required* by a rule of law to be drawn as to the existence of one fact from the existence of some other established basic fact. They may be created by statute if there is some justification of public policy, or a rational connection between the fact proved and the fact presumed. But statutes declaring certain facts to be even prima facie or rebuttable evidence of other facts can violate constitutional guaranties of due process where there is no rational connection between the facts proved and the ultimate fact presumed. *Tot* v. *U.S.*, 319 US 463, 87

L ed 1519, 63 S Ct 1241 (1943); *McFarland* v. *American Sugar Ref. Co.*, 241 US 79, 60 L ed 899, 36 S Ct 498; *Manley* v. *Georgia*, 279 US 1, 6, 73 L ed 575, 578, 49 S Ct. 215; *Morrison* v. *California*, 291 US 82, 91, 78 L ed 64, 54 S Ct. 281; *Great Atlantic & Pacific Tea Co.* v. *Ervin*, 23 F Sup 70, 80 (DC Minn 1938); *U.S.* v. *Jones*, 176 F 2d 278 (9th Cir 1949); 1 Jones, Evidence (5th ed), 23–24, § 12; IV Wigmore, Evidence, 715, § 1353; Anno 162 ALR 495; 16A CJS 817, Constitutional Law § 621, n 74; 20 Am Jur 39–41, Evidence §§ 9, 10; 10 Tex Law Rev 34 (1931–32); *City of Seattle* v. *Ross*, — Wash —, 344 P 2d 216, 219 (1959).

Mr. Justice Holmes in *McFarland* v. *American Sugar Ref. Co., supra*, observes:

> "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.' * * *." (241 US at 86)

Perhaps the clearest and best enunciated statement of the test of rational connection is found in that made by Mr. Justice Roberts in *Tot* v. *U.S.*, *supra* (87 L ed at 1524):

> "* * * Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where

> the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts."

Although this court has never been faced with a problem of the character now presented, our adherence to these principles has implicit support, as reflected by *Wyckoff* v. *Mutual Life Ins. Co.*, 173 Or 592, 608, 147 P2d 227, where we cited with approval and with the emphasis there indicated the following statement from 20 Am Jur 40, Evidence § 9:

> "* * * Statutes declaring certain facts to be prima facie or presumptive evidence of other facts do not, *where there is some rational connection between the facts proved and the ultimate facts presumed,* deny equal protection of the laws or violate constitutional guaranties of due process of law. * * *"

See, also, our holding in *Burke* v. *Burke,* 216 Or 691, 697, 340 P2d 948, where Mr. Justice Millard, in discussing the presumption of a child's legitimacy by reason of being born in wedlock (ORS 41-360(3) and 109.070), observes: "* * * the modern trend is away from the rule of conclusiveness. 57 ALR2d 759," and cites with approval the following statement from *Anderson* v. *Anderson,* 214 Cal 414, 5 P2d 881, 882: "It [a presumption] cannot prevail as against undisputed facts to the contrary and at variance with the laws of nature." Although discussing the Burke case presumption of legitimacy, we are of the opinion that the statements quoted are equally forceful when the making of "valid contract" is conclusively presumed to have been accomplished by one non compos mentis while a thrall to his mental disability.

What is true of rebuttable presumptions has even more cogency with respect to conclusive presumptions which operate to deprive individuals of their rights or infringe upon constitutionally protected areas. *Heiner* v. *Donnan,* 285 US 312, 76 L ed 772, 52 S Ct 358 (1932); *Schlesinger* v. *Wisconsin,* 270 US 230, 70 L ed 557, 46 S Ct 260, 43 ALR 1224; *City of New Port Richey* v. *Fidelity & Deposit Co. of Maryland,* 105 F2d 348 (5th Cir 1939), 123 ALR 1352, *Comm'r of Internal Revenue* v. *Clark,* 202 F2d 94 (7th Cir 1953). See, also, 12 Am Jur 317–18, Constitutional Law § 625.

In *Heiner* v. *Donnan, supra,* the court dealt with a provision of the Internal Revenue Code which made transfer of a gift two years prior to death conclusively presumed to be made in contemplation of death. It was held that the presumption violated the prohibition of the Fifth Amendment against the taking of property without due process of law and the presumption was characterized by Mr. Justice Sutherland as follows:

> "* * * whether the * * * presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality, * * *." (76 L ed at 780)

All parties concede the extreme degree of the mental incompetency of the deceased veteran, yet, the government's only claim to his property (in this instance, *not unexpended funds received from United States pensions,* but an inheritance received from his brother) rests solely upon a conclusive presumption that his presence in the hospital at death resulted in a "valid contract for the disposition * * * of all property * * * owned by [the] decedent" at the time of his death.

We find in the situation presented by Warpouske's history and the employment of the presumption relied upon by appellant, a striking exemplification of an irrational and unnatural relationship between the proven fact of his death in a government hospital as an incompetent and the ultimate fact presumed. It is one having all the elements which have prompted courts to deplore such a mandate as an arbitrary and unreal artifice, contravening the Due Process Clauses of the Fifth and Fourteenth Amendments. In this matter, when applied to Warpouske and other unfortunates of the same category, it is, as said by Mr. Justice Sutherland in *Heiner* v. *Donnan, supra,* "an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality."

The presumption here excludes consideration of all the circumstances which brought Warpouske to the hospital and made him an involuntary patient there from the time of his entry until the day of his death. We are now asked to presume, however, that a man totally non compos mentis voluntarily accepted the benefits the hospital bestowed (and to which he was entitled under the law, without charge) and who, because of his failure to make a testamentary disposition of his estate while in the hospital, and to further presume that by his enforced silence he waived his right so to do in favor of the government. The death of the veteran in the hospital, although helpless and there without his direction or knowledge is thus made the sole factor which activates the absolute presumption that he made "a valid contract for the disposition" of his property to the United States (Secs. 17, 17a) and which, if applied, forecloses any opportunity to present evidence that the veteran was wanting in mental capacity either then

or for years before, to make any kind of a valid contract or will.

That the creation of this contract with Warpouske might well be a proper subject for judicial inquiry despite the conclusive presumption written into the Act of 1941 is strongly indicated by Judge Tolin in *U.S.* v. *Security-First Nat. Bank of Los Angeles, supra* (130 F Sup 521), by his observation at page 522, reading:

> "No party has challenged the validity of this agreement on the ground that there was no agreement as to the footnoted matter, and although a footnote to an application for admission to a hospital is not an exemplary way to establish privity of contract, in the absence of challenge, it is sufficient. Considering that applicants for domiciliary care in a hospital are usually sick and often lacking acute mental perception, the force of a footnote to the entry application (the footnote purporting to create a special contract of unusual character) might be considerably diminished, and frequently destroyed by a careful inquiry into the circumstances of the execution of the application for domiciliary care. * * * That contracts of this character may be valid if properly entered into, is firmly established by Supreme Court adjudication."

We do not think the Congress ever intended to apply the presumption found in the Act of 1941 to a situation akin to what we find here, for to thus appropriate the property of the estate of an utterly helpless veteran by the arbitrary device of "conclusive presumption" is basically contrary to the traditional solicitude of the government for its disabled war veterans.

There is an even more cogent reason for assuming that the position taken by appellant's counsel is not

consonant with Congressional intent. To conclude this matter in favor of the government by approving its claim to Warpouske's inherited money solely because of the conclusive presumption it invokes, would, in fact, transform the status of the government claim in the instant matter to one closely approaching the exercise of an arbitrary right of escheat, rather than upon a claim of right derived from contract.

We have no doubt that one of the motivations for the legislative design upon which the Act of 1941 is predicated, in terms of contract, was the Congressional consciousness of its want of constitutional power to exercise a right of escheat in an estate, knowing full well that all matters concerning the devolution of property are reserved by the Tenth Amendment to the several states. *Mager* v. *Grima*, 49 US 490, 493, 12 L ed 1168, *Pennoyer* v. *Neff*, 95 US 714, 722, 24 L ed 565; *U.S.* v. *Fox*, 94 US 315, 320, 24 L ed 192; *U.S.* v. *Perkins*, 163 US 625, 628, 41 L ed 287, 16 S Ct 1073. See, also, *U.S.* v. *Security-First Nat. Bank of Los Angeles, supra* (130 F Sup at 523).

Notwithstanding the multiple holdings of the federal courts that the Act of 1941 envisions a contractual relationship, counsel for appellant would have us believe the contrary and to do so places reliance upon the decisions of state courts.

But before we give critical attention to the several cases which appellant's counsel urges upon us, it is important that we take notice of the two separate and distinct acts under which the government can lay claim to the estates of veterans dying intestate in a government facility without heirs surviving them.

The first, in the order of their enactment, was § 450(3), 38 USCA. This subsection was added to § 450, supra, by Act of July 3, 1930, and we will refer to it as the Act of 1930. The other is the Act of

1941, under which the federal government lays its claim against the estate of Warpouska.

Both Acts rely upon two different theories of right as a basis for the governmental claim of ownership and each reaches an entirely different species of property in the veteran's estate. Moreover, the property recovered under the Act of 1930 goes into an entirely different fund than that obtained under the Act of 1941.

The Act of 1930 implements a recoupment of any unused or accrued funds derived from federal pensions or other forms of veteran gratuity, whereas, the Act of 1941 is designed to place in the government's reach any other personal property of the veteran no matter from whence derived. Hence, we have here the relinquishment to the government without contest the sum of $1,134.25, earlier referred to as being funds representing unexpended pension benefits. This was correctly done pursuant to the Act of 1930. But as to the balance of decedent's estate, represented solely by the inheritance received from his brother, appellant claims ownership, not under the Act of 1930, but under the Act of 1941, on the theory of a conclusive contract.

No element of contract is present or required under the earlier Act of 1930, as is evident from a reading of the pertinent part of Sec. 450(3):

> "* * * That any funds in the hands of a guardian, curator, conservator, or person legally vested with the care of the beneficiary or his estate, derived from compensation, automatic or term insurance, emergency officers' retirement pay, or pension, payable under said Acts, which under the law of the State wherein the beneficiary had his last legal residence would escheat to the State, shall escheat to the United States and shall be returned by such guardian, * * * to the Veterans' Administration, and

shall be deposited to the credit of the current appropriations provided for payment of compensation, insurance or pension."

The obvious intent, purpose and meaning of the foregoing section of the Act of 1930 is that the federal government has not made the gift of a pension or other gratuity absolute and complete, but has retained in itself at all times a contingent reversionary interest, which under the circumstances stipulated in Sec. 450(3), would vest the residue of the gift in the government to the exclusion of any claim of escheat by the state. *In re Lindquist's Estate,* 25 Cal2d 697, 154 P2d 879 (1944). No claim of contract is involved. The right to the continuing interest of the government to the unused portions of such gratuities attaches from the date of the initial disbursement of its bounty. See *Abbott* v. *Morgenthau,* 68 App DC 83, 93 F2d 242.

Unfortunately, all courts have not observed this clear and important distinction between what the government can properly claim under the Act of 1941 and can properly obtain under the Act of 1930, nor have they noted the difference in the basic theories around which each of said Acts is separately built. This is found to be particularly true when one examines the decisions of the state courts, and is exemplified by the cases cited to us by appellant. To the extent that they do not adjudicate claims made to property under the Act of 1941, but are rather addressed to the recovery of the kind of property specified in the Act of 1930, they may be laid aside.

With these matters in mind, we now turn to a consideration of the cases which appellant has marshaled.

*In re Gonsky's Estate,* 79 ND 123, 55 NW2d 60 (1952), the estate "consisted of United States savings bonds and cash all derived from payments to him [Gonsky] during his lifetime by the United States

as retirement for disability as a regular army person" (55 NW2d, supra, at 61).

*In re Skriziszouski's Estate,* 382 Pa 634, 116 A2d 841 (1955), again, we find that the decedent's estate amounting to $21,905, "was composed of money received from the Federal Government through the Veterans' Administration, plus interest earned thereon," except for $50 received as a bonus from the Commonwealth of Pennsylvania (116 A2d, supra, at 842).

The same situation as to the character of the estate left by decedent prevailed *In re Campbell's Estate,* 195 Misc 520, 89 NYS2d 310 (1949), where the surrogate court observes, at p 311: "His [Campbell's] estate consists of assets derived solely from pensions paid to the decedent through his committees by the United States Government." So, too, in the *Matter of the Estate of Alexander Zakowski* (1950) (an unreported opinion of the Circuit Court for Wayne County, Michigan, copy of which is incorporated in appellant's brief by the appendix).

Thus, in every state case to which we make reference in the preceding paragraphs, the government's reversionary right to recovery of unused bounties is made clear by the provisions of the Act of 1930 and is the explanation for those decisions. Here, however, the government reaches not for the residue of pension funds, but for property which came to Warpouska by inheritance. Obviously, the foregoing cases do not speak to the contractual aspect of a claim arising under the Act of 1941, nor, for the same reason, do they discuss or refer to the conclusive presumption clause of the Act of 1941 upon which appellant rests its case. The only element common to the last-mentioned cases and the one at bar is that the decedents were mentally incompetent, a factor which in no way militates against the government's

reserved right to effect a recovery under the Act of 1930.

Appellant also points to *In Re Bonner's Estate,* 192 Misc 753, 80 NYS 2d 122 (1948), a decision of the surrogate court of New York, but never appealed. We have reserved comment on that case because it more nearly proximates the factual situation disclosed by the record in the case at bar. The decedent, Bonner, was an adjudicated incompetent and an inmate of veterans hospitals continuously from 1922 until his death in 1944. He left assets consisting of Adjusted Service Bonds of the value of $1,550 and other assets worth $3,350.21 from an undisclosed source and in the opinion referred to as the "distributable balance," and, therefore, in the property aspect similar to Warpouske's estate. The court rests its conclusion favorable to the government upon both the Act of 1930 and the Act of 1941.

A too casual reading of the decision might warrant a conclusion that it supports the government's position in this appeal. But critical analysis nullifies its value here. As to the service bonds, a form of governmental gratuity, the court ruled correctly.

Concerning the rest of the estate, i.e., the "distributable balance," which came to Bonner from other than governmental sources, the court makes this arresting and palpably incorrect statement at p 126:

> "* * * Apart from the Adjusted Service Bonds which were paid to decedent as additional compensation for his service in World War I, it is not claimed that the distributable balance herein consists of the residue of governmental gifts. *This fact, however, is not controlling.* * * *"(Emphasis supplied.)

citing as its sole authority *Matter of McGhee,* 149 Misc 713, 268 NYS 79 (1932), aff'd 239 App Div 763, 264 NYS 903, aff'd 262 NY 686, 188 NE 121.

But McGhee fails to support such a sweeping conclusion. A reading of McGhee discloses two interesting and distinguishing differences from the Bonner case and the present appeal. McGhee, a veteran of the Civil War, was a resident of the National Military Home at Bath, New York. When he entered that facility in 1929, he executed a written application which was, in fact, a contract leaving to the government the proceeds of his estate not disposed of by will and embodying the terms of what was then Sec. 136 of 24 USCA. That Act was the predecessor to the present Act of 1941. The claim of the government, rightly adjudicated in its favor, rested solely on a written agreement as then required by the Act as a condition to his entry. McGhee died intestate and without heirs. No issue was raised concerning his mental capacity to make such a contract, nor does the decision suggest that he was at any time incompetent.

We find nothing in the cases cited to us by appellant which is decisive here and for the reasons previously stated, hold that the Act of 1941 is inoperative when applied to the estate of Adam B. Warpouske.

Affirmed.

2. JUDGMENT OF THE SUPREME COURT OF OREGON

[Formal parts omitted.]

Whereupon on this Wednesday, the 18th day of May, 1960,

* * * * *

This cause on April 13, 1960, having been duly argued and submitted upon and concerning all questions arising upon the transcript and record and then reserved for further consideration, and the Court having fully considered all said questions as well as suggestions of

counsel in their argument and briefs finds there is not error as alleged.

It therefore is CONSIDERED, ORDERED and DECREED that the decree of the court below rendered and entered in this cause be and the same is in all things affirmed.

The appellant having given an undertaking on appeal with United States Fidelity and Guaranty Company conditioned that appellant will pay all damages, costs and disbursements which may be awarded against it on appeal.

It therefore is Ordered that respondent State of Oregon have and recover of and from appellant and its surety its costs and disbursements in this court taxed at $30.

It further is Ordered that this cause be remanded to the court below from which the appeal was taken with directions to enter decree in accordance herewith.

3. Opinion of the Circuit Court of Multnomah County, Department of Probate

[Formal parts omitted.]

That the deceased Adam B. Warpousko was mentally ill for many years prior to December 26, 1941, and continued to be mentally ill from said date until his death;

That he was not mentally competent to understand the consequences of his acceptance of hospitalization in the Veterans Administration Facilities or to enter into any contract respecting such hospitalization or the consequences thereof, and in particular he was not mentally competent to enter into any agreement, either by word or deed, whereby his undisposed personalty would vest in the United States as Trustee for the General Post Fund;

That unless the deceased, either by word or deed, entered into a valid contract, the provisions of Section 17, Title 38, United States Code, cannot and do not control the disposition or vesting of his personalty at the time of his death;

That the administrative expenses in the Guardianship Estate of Adam B. Warpouske (Multnomah County Clerk's No. 76000) should be borne proportionately by the assets derived from United States Government pension funds and the assets derived from the decedent's brother in Wisconsin;

And that that part of the decedent's estate which represents the balance of funds derived from Veterans Compensation escheats to the Federal Government by virtue of Section 450, Title 38, U.S.C., and that the remainder of the estate escheats to the State of Oregon for the benefit of the Common School Fund.

4. Findings of Fact and Conclusions of Law, Circuit Court of Multnomah County

FINDINGS

1. The decedent, Adam B. Warpouske, was mentally ill for many years prior to December 26, 1941, and continued to be mentally ill from said date until his death.

2. On a number of occasions prior to March 1, 1956, the decedent, Adam B. Warpouske, was hospitalized in various hospitals operated in various places in the United States of America by the United States Veterans' Administration.

3. The said Adam B. Warpouske was not mentally competent to understand the consequences of his acceptance of hospitalization in hospitals operated and conducted by the United States Veterans' Administration, nor was he competent to enter into any

contract respecting any such hospitalization; and in particular, he was not mentally competent to enter into any agreement, either by word or deed, whereby his undisposed personalty would vest in the United States of America as trustee for the General Post Fund.

CONCLUSIONS

1. Unless the deceased, either by word or by deed, entered into a valid contract upon entry into a hospital conducted by the United States Veterans' Administration, the provisions of § 17, Title 38, United States Code, cannot and do not control the disposition or vesting of his personalty at the time of his death.

2. That part of the decedent's estate which represents the balance of funds derived from United States Veterans' compensation should be charged with its proportionate share of the administration expenses in the guardianship estate of Adam B. Warpouske, incompetent, Multnomah County Clerk's Filing No. 76000; and after such charge of proportionate expenses, the remainder of that part of the decedent's estate, which represents the balance of funds derived from compensation paid by the United States Veterans' Administration, shall be distributed to the United States of America under the provisions of § 450, Title 38, United States Code.

3. The remainder of the estate of the decedent escheats to the State of Oregon for the benefit of the Common School Fund and so is distributable to the State Land Board of the State of Oregon.

4. A table delineating the amounts in dollars to be distributed to the United States of America and to the State Land Board of the State of Oregon, under the foregoing conclusions of law, is annexed hereto as Exhibit "A" and is by reference made a part hereof; and the result of such table is that out of the

sum of $13,727.14, now on hand as the assets of this estate, the sum of $971.47 shall be distributed to the United States of America, with the remaining sum of $12,755.67, distributable to the State Land Board of the State of Oregon.

5. LETTER FROM THE VETERANS ADMINISTRATION

VETERANS ADMINISTRATION,
OFFICE OF GENERAL COUNSEL,
*Washington 25, D.C., August 9, 1960.*

77-85-321
023B
Warpouske, Adam B.
XC-1 628 265

Re: Estate of Adam B. Warpouske (Ore. Sup. Ct., No. 17381).

The Honorable J. LEE RANKIN,
*The Solicitor General of the United States,*
*Washington 25, D.C.*

DEAR MR. RANKIN: This is in response to your request for an expression as to the practice of the Veterans Administration under the so-called vesting statute, formerly 38 USC 17-17j (now 38 USC 5220 et seq.).

The Veterans Administration, since the enactment of P.L. 382, 77th Congress, 55 Stat 868, on December 26, 1941, amending the Act of June 25, 1910, has consistently applied the criteria set forth in 38 USC 5220 et seq. in determining the Government's entitlement to the personal property of a deceased beneficiary. Specifically, the question whether the veteran was sane or insane at the time of his admission has never been

considered pertinent in this connection. The VA Regulation implementing P.L. 382 is set forth in 38 CFR, 1956 Rev., in sections 12.19 et seq.

Very truly yours,

(Sgd) FRED B. RHODES, JR.,
*General Counsel.*

U.S. GOVERNMENT PRINTING OFFICE: 1959